

Liberty Mutual Insurance asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Hann's determination that Liberty is liable for the expense of J. P.'s medical care under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

On October 18, 2002, Ms. P. filed an application to compel her employer, Sentinel Consumer Products, to pay workers' compensation benefits for Ms. P.'s bilateral carpal tunnel syndrome. During the subsequent course of proceedings, Sentinel's three different workers' compensation insurance companies ("Liberty," "Royal," and "Fire & Casualty") were added as respondents to Ms. P.'s claim. The nature of Ms. P.'s claim was also modified from an industrial accident claim under the Workers' Compensation Act to an occupational disease claim under the Occupational Disease Act. Finally, it appears that the scope of Ms. P.'s claim was expanded to include payment of medical care for lateral epicondylitis as well as carpal tunnel syndrome.

Judge Hann held an evidentiary hearing on Ms. P.'s claim on December 18, 2003. On June 29, 2004, Judge Hann issued her decision ordering Sentinel and Liberty to pay for medical care necessary to treat Ms. P.'s carpal tunnel and lateral epicondylitis, which Judge Hann described collectively as Ms. P.'s "bilateral upper extremity condition."

Liberty now requests Appeals Board review of Judge Hann's decision. Liberty does not challenge Ms. P.'s right to have her medical expenses paid, but argues that Sentinel's other insurance companies are liable for those expenses.

FINDINGS OF FACT

The Appeals Board adopts Judge Hann's findings of fact, which may be summarized and corrected as follows.

Ms. P. began work for Sentinel as a machine operator during August 1998. Her work required repetitive motion of her arms. By August 1999 she had developed symptoms of carpal tunnel syndrome in both arms. She began receiving medical attention on December 21, 1999,¹ and underwent steroid injection in her left arm and carpal tunnel surgery on her right arm on February 16, 2000.

After surgery, Ms. P. was off work for about three weeks. On March 7, 2000, she returned to light duty work. On April 10, 2000, she resumed her regular duties. She also received physical therapy from May 21 through September 18, 2000.

On November 2, 2000, Ms. P. sought medical attention for pain in her right elbow. Dr. Potter, the treating physician, concluded that Ms. P. was suffering from right lateral epicondylitis²

caused by the physical therapy she had received to treat her carpal tunnel syndrome.

On December 19, 2000, Dr. Anden evaluated Ms. P.'s condition on behalf of Liberty. Among other things, Dr. Anden confirmed that Ms. P. suffered from right lateral epicondylitis. With respect to the cause of this condition, Dr. Anden stated: "This condition appears to be indirectly related to the original condition of carpal tunnel syndrome starting 12/21/99 as this condition has occurred during her transition to full time, full duty work activities following carpal tunnel release and she attributes this to necessity of performing repetitive light duty tasks."

Liberty was Sentinel's workers' compensation carrier from October 1, 1994, until August 1, 2000. Sentinel was then insured by Royal until August 1, 2001. At that time, Fire & Casualty began providing workers' compensation coverage for Sentinel.

DISCUSSION AND CONCLUSIONS OF LAW

As a preliminary matter, the Appeals Board notes Liberty's allegation that the recording of the evidentiary hearing in this matter is inaudible. However, Commission staff has reviewed the recording and report that it is, in fact, audible. Also, the Appeals Board notes Liberty's reference to Ms. P.'s deposition testimony. However, Ms. P.'s deposition is not included in the evidentiary record and cannot be considered by the Appeals Board.

The only benefit Ms. P. seeks from her occupational disease claim is payment of medical expenses for treatment of her bilateral carpal tunnel syndrome and right lateral epicondylitis. Section 34A-3-107 of the Utah Occupational Act, in conjunction with §34A-2-418 of the Utah Workers' Compensation Act, provides that Ms. P. is entitled to such payment.

Liberty has accepted liability for expenses for medical treatment of Ms. P.'s carpal tunnel syndrome. As to expenses of treatment of her epicondylitis, Liberty and Royal concede she is entitled to payment of those expenses too. The only dispute is which of those two insurance carriers is liable for the expenses. This dispute is resolved by application of the "last injurious exposure rule."

The last injurious exposure rule places full liability on the insurance carrier covering an employer at the time of the last injury or exposure that is causally related to the disability. See *Larson's Workers' Compensation Law*, §153.02(1). In Pacific Employers Insurance Co. v. Industrial Commission, 157 P.2d 800 (Utah 1945), the Utah Supreme Court concluded that the date on which an employee is last exposed to injurious conditions at work "attaches the liability to the employer's insurance carrier as of that date. . . ." The Appeals Board also notes Professor Larson's observation: "This rule . . . is the majority rule in successive insurer cases, either by judicial adoption or by express statutory provisions." *Larson's Workers' Compensation Law*, §153.02(1). "The last injurious exposure rule is also utilized in occupational disease cases" The . . . rule is particularly useful for allocating liability in occupational disease cases, which often involve a number of insurers." *Larson's* at §153.02(5). Therefore, whichever insurance company insured Sentinel on the date that Ms. P. was last exposed to work conditions causally related to her epicondylitis must pay her expenses for treatment of that condition.

The evidence on this point is limited to the opinions of Dr. Potter and Dr. Anden. Dr. Potter,

the treating physician, has expressed a direct opinion that the physical therapy Ms. P. received to treat her carpal tunnel syndrome was the cause of her epicondylitis. In other words, the epicondylitis was a result of medical treatment that was, in turn, necessary to treat the carpal tunnel syndrome. In contrast, Dr. Anden's report is somewhat ambiguous and does not distinguish between the doctor's own informed medical opinion and the lay opinions volunteered by Ms. P.. On balance, the Appeals Board finds persuasive Dr. Potter's opinion that Ms. P.'s epicondylitis was caused by the physical therapy she received to treat her carpal tunnel syndrome.

As noted in *Larson's Workers' Compensation Law*, §10.09(1), "It is now uniformly held that aggravation of the primary injury by medical or surgical treatment is compensable." In this case, the evidence establishes Ms. P. was last injuriously exposed to conditions causing her carpal tunnel syndrome during the time Liberty was Sentinel's insurer. The epicondylitis that resulted from treatment of the carpal tunnel syndrome is, therefore, also Liberty's liability.

ORDER

The Appeals Board affirms Judge Hann's decision and denies Liberty's motion for review. It is so ordered.

Dated this 31st day of March, 2005.

Colleen S. Colton, Chair
Patricia S. Drawe
Joseph E. Hatch

1. Judge Hann's reference to the date of October 6, 1999, as the first date of Ms. P.'s medical care comes from a "Physician's First Report" that pertains to another individual. This First Report was erroneously included by the parties in their joint medical exhibit.
2. "Epicondylitis" is defined as "inflammation of the epicondyle or of the tissues adjoining the epicondyle of the humerus." See *Dorland's Illustrated Medical Dictionary*, 27th ed.